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BOSNIA AND HERZEGOVINA

GENERAL ADMINISTRATIVE LAW FRAMEWORK

ASSESSMENT MAY 2008

Preface

This report updates the administrative framework portion of Sigma's June 2006 assessment report on Public Service and the Administrative Framework in Bosnia and Herzegovina.

We use the notion of general administrative law to denote those parts of administrative law that are applicable – fully or partially, primarily or supplementarily – to all administrative settings, public bodies, administrative activities and administrative relationships. In other words, general administrative law would be the part of administrative law that is not only applicable across the whole administration, but also contains principles and norms that give rise to special regulations or specific organisational functioning.

Administrative law is the refined product of the pursuit in the course of history of the liberal goal to submit public powers to the law by ensuring that any action of the state is subject to the law or ruled by law. Modern democratic states derive their administrative law from their constitutions. The study of administrative law in a country cannot be dissociated from that of constitutional law.

The general legal framework for the administration is nevertheless comprised, first and foremost, of administrative law. A first approximation of the definition of administrative law is that it is a part of national public law (in EU Member States it is also now a part of the supranational legal order of the EU) that regulates the powers, competences (responsibilities), organisation and functioning of public authorities or of the public administration as a whole. This regulation includes relations established internally between administrative bodies and externally with other administrative bodies and with the general public.

Civil service legislation forms a part of administrative law, which is the instrument used by civil servants to ensure that the administration operates under the rule of law. Reforming the civil service without reforming the general administrative law would be an incomplete reform. For that reason this assessment attempts to answer the following question:

Do Bosnian administrative practices and the legal administrative framework guarantee the principle of legality in administrative decision-making, and are they sufficient and appropriate to guide civil servants and public officials and to make them accountable for their performance?

Given the politico-administrative structure of the country, we need to address this problem by looking into the units that form the country: BiH Common Institution; Federation of Bosnia and Herzegovina (FBiH); and Republika Srpska (RS), leaving apart the Brcko District (BD), the cantons and other lower levels of government.

I – STATE LEVEL BOSNIA AND HERZEGOVINA

Distribution of Competences and Organisation of the Administration

The fundamental law within the administrative framework of the State of BiH is the 2003 *Law on Ministries and Other Bodies of Administration of Bosnia and Herzegovina*.¹ The law establishes ministries and identifies administrative organizations and other institutions carrying out tasks and duties of administration within the competence of the central institutions of BiH; it specifies their scope of work, the manner of their management, as well as other issues concerning their functioning. Tasks and duties of administration from within the competence of BiH are carried out by the ministries, independent administrative organizations, administrative organizations within the ministries, as well as by other institutions, as established by separate laws, or as assigned by separate laws to carry out tasks and duties of administration (article 2).

Ministries are bodies of administration carrying out administrative and professional tasks and duties from within the competence of BiH in one or several domains and are responsible for the implementation of laws and regulations. The ministries prepare laws and regulations and general acts falling within their scope and perform other tasks as determined by legislation (article 4).

Administrative organizations carry out administrative and professional tasks of which the character and manner of execution require a special organization and autonomy. Administrative organizations have legal personality and may be established as organizations either within a Ministry or as independent administrative organizations. Administrative organizations within ministries report to their parent Ministry, and independent administrative organizations report to the Council of Ministers of BiH. Administrative organizations within ministries are financed from the State budget through their respective Ministry. Independent administrative organizations are financed from the state budget and from independent sources (article 5).

Keeping track of which competences have been given to which institutions is the necessary starting point for a proper understanding of the State's overall distribution of competences, organization of administration as well as decision-making authority.

The current attribution of competences is not clear, sometimes even to respondents within the same institution. One common assumption is that the attribution of competences should be found in one main organizational law on the structure and scope of work of the executive, on which the key material laws for each policy area would further elaborate. This seems to have been the intention, with legislation covering most of the ministries and some of the key agencies and other bodies: their legal competences are established in the *Law on Ministries and other Bodies of Administration of Bosnia and Herzegovina*, which is considered to be a general law on the organisation of the government and the administration at the state level. However, this approach, in which the consistency of and coordination amongst competences is taken for granted and is expected to be built in "as part of the legal system", is not the most practical under the present circumstances.

The structure and mandate of the BiH executive has been constantly developing, and the 1997 *Law on Council of Ministers* was re-enacted or radically amended in 2000, 2002 and 2003, each time with the inclusion of new material responsibilities. This trend towards a "larger State" results in practice in more and more direct interactions between the BiH institutions and individual citizens. The creation of State-wide bodies, such as the *Communications Regulatory Agency* or the State-level *Indirect Taxation Authority* (ITA), is illustrative.

There is insufficient clarity concerning the distribution of administrative competencies amongst public authorities, because of the state's peculiar constitutional set-up. At each level, there is a general law on the organisation of the government and the administration, but there is a continuous "struggle for competence" between the central and entity governments. Public agencies have clearly established accountability linkages and obligations (for example, regular reporting with clearly established contents) to parent ministries, but this is usually done rather in a routine *pro forma* way.

Principles of Legality and Equality

The *right to equality* before the law is one of the key standards of fundamental rights. It concerns the equality of persons both in relation to each other and before the law. In that regard, it sets out access to other fundamental rights as well as their exercise. This is particularly the case with regard to the prohibition of discrimination.

¹ Official Gazette of Bosnia and Herzegovina, nos. 5/03 and 42/03

The Constitution of BiH in Article II (2) provides for the Non-Discrimination Clause that reads as follows: “The enjoyment of the rights and freedoms provided for [in this Article or in the international agreements listed in Annex I to this Constitution] shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” It is self-evident that the clause guarantees equality before the law throughout the country, as it is promulgated by the norm of the State Constitution. This, combined with the direct applicability of the *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)* makes a compact safeguard to equal treatment of citizens of BiH. However, a ruling of the BIH Constitutional Court of 2000 established ethnicity as the sole way of determining social political belonging. The ruling equalized formal ethnic representation in government structures, while at the same time validating ethnicity above all else as the definitional component of personal identity, political representation and government configuration. It left those who did not identify themselves as belonging to any of the three ethnicities without equal constitutional protection.

The hierarchy of norms, which creates a "chain" beginning with international treaties, followed by national Constitution and laws, decrees, etc. and ending with “individual” legal acts, such as judgments of courts or decisions of administrative agencies. In accordance with Article II of the BiH Constitution, the ECHR takes priority over national law. Its provisions have direct applicability and are considered to be an integral part of national law. Consequently, all provisions of national laws that are not in harmony with the ECHR are not legal and are not to be applied. As the State of BiH has full membership in the Council of Europe, the case law of the European Court of Human Rights is binding on both judiciary and public administration institutions throughout the country. This notwithstanding, the relevant case law of the European Court of Human Rights and domestic jurisprudence are little known, with the result that officials deciding on administrative matters consider this constitutional safeguard mostly symbolic in value. Beyond these arrangements, which mainly affect the human rights issue, the hierarchical structuration of the different legal orders that co-exist in the country is confusing, problematic and inimical to the rule of law.

The rule of law is recognized as a constitutional principle. Namely, Article I (2) of the Constitution of BiH states that “Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law”. Administrative authorities and institutions possessing public authority are required to decide on the basis of laws within the limits of the legal powers conferred on them and in compliance with the aims for which these powers were granted. The rules of the procedure laid down in the provisions of the *Law on Administrative Procedure (LAP)* is also valid for the cases in which an institution possessing public powers is authorized to take discretionary decisions in administrative matters (article 4 of LAP).

Accountability Institutions: Ombudsman and Inspections

The accountability institutions have a constitutional character and their powers are in principle sufficient to guarantee both acceptable accountability standards and mechanisms, but there is an overall lack of compliance, especially with Ombudsmen's recommendations. Judicial and administrative decisions are generally complied with in a much smoother manner.

Ombudsman

The 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP) introduced a human rights appeals system for BiH.² *The Human Rights Commission*, consisting of the *Office of the Human Rights Ombudsperson* and the *Human Rights Chamber*, was modelled on the European Court of Human Rights. The Chamber was designed as an international human rights court applying the ECHR standards in BiH. The Commission allowed BiH citizens to bring charges either against the state BiH or its two entities to the Chamber if these charges were based on violations of human rights and if all local appeal possibilities had been exhausted. Decisions of the Human Rights Chamber were binding on the authorities in Bosnia and Herzegovina.³ This system of protection of human rights expired at the end of 2003. As from 1 January 2004, new cases alleging human rights violations are decided by the BIH Constitutional Court.

² See *Annex 6: Human Rights* of the General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP).

³ Human Rights Chamber (HRC) was a *sui generis* HR institution shaped up after the European Court to redress massive violations of human rights occurred in BiH during the war. The Chamber has the mandate to consider alleged or apparent violations of human rights as provided in the ECHR and the Protocols thereto, and alleged or apparent discrimination arising in the exercise of the rights and freedoms recognised in the Convention and 15 other international agreements listed in the Appendix to Annex 6. Priority is given to allegations of especially severe or systematic violations, as well as those founded on alleged ungrounded discrimination. According to the Agreement, made pursuant to Article XIV of Annex 6 to the GFAP,

The Ombudsman is an independent institution of the State of BiH. In a general sense, the Office of the Ombudsman (and the Human Rights Chamber) consider alleged and apparent violations of human rights as provided in the ECHR and the Protocols thereto, or alleged or apparent discrimination on any grounds in the exercise of any of the rights and freedoms provided for in the relevant international agreements, wherein a violation is alleged or seems to have been committed by the parties or by any official or organ of the parties, or by any individual acting under the authority of such official or organ.

The procedures established by the Office of the Ombudsman are modelled on those of the European Commission of Human Rights. The High Representative for BiH imposed the 2000 *Law on the Human Rights Ombudsman of Bosnia and Herzegovina*.⁴ The law regulates its legal nature, powers and jurisdiction, composition, appointment and resignation, co-operation with the Ombudsman institutions of the entities, immunities and incompatibilities, investigation procedure, obligation to co-operate with the institution, confidential and secret documents and duty of discretion, the responsibility of the authorities and officials, recommendations, reports, procedural rules, staffing and equipment. The Ombudsman institution is in fact the institutional vehicle for general complaints against any aspect of maladministration.

The three ethnic ombudsmen that existed previously were abolished by the Law on Changes and Amendments to the Law on the Human Rights Ombudsmen of BiH adopted on 25 April 2006, whereby all human rights protectors established by Dayton and GFAP were merged into a single Ombudsman institution, renamed as Office of the Human Rights Ombudsmen (OHRO) of BiH located in Banja Luka, which started operations in January 2007. The Ombudsmen of the entities continue to exist on their own.

Administrative Inspection

At the State level, under the current administrative set up, administrative inspectors are regulated by the 2002 *Law on Administration*.⁵ (LA), but they have short history, as these inspectors were appointed fairly recently. This is somewhat paradoxical, since State-level legislation is in theory where the range of powers provided to inspectors is the widest and strongest.

The supervision over the implementation of the State LAP is carried out by the Administrative Inspectorate, as well as in any other legally permitted way. The authorities and the institutions possessing public powers are required to facilitate the inspection upon administrative decision-taking and to act in accordance with the orders of the Administrative Inspectorate, which carries out the supervision, and, at the request of this Inspectorate, to provide necessary data, files and information on the issues pertaining to the administrative matters to be resolved in the administrative procedure (article 288 of the LAP). The Ministry of Justice is the institution in which the administrative inspection has traditionally been placed, both in former Yugoslavia and in its federated republics.

Administrative inspection is performed by the administrative inspectors (article 83 LA). A person may be appointed as an inspector if he fulfils the following criteria: law degree, expert exam and at least 3 years of experience in the most complex administrative matters. Administrative inspectors, while performing supervision over the implementation of laws and regulations, supervise in particular the exercise of rights and legal interests and the fulfilment of obligations to citizens, public corporations and companies, agencies and other legal entities in the course of administrative procedure. They also supervise implementation of laws and regulations related to the organization and functions of administrative organs, labour relations in administrative organs, criteria to be fulfilled by persons vested with decision-making powers (administrative procedure) as well as timeliness in decision-making, collection of evidence, administrative execution, keeping records, etc. (article 84 LA). Inspectors are to keep accurate records on their assessments. A copy of the records is delivered to the head of the relevant administrative institution and to the Council of Ministers (CoM) if the need arises (article 86 LA).

If, while fulfilling his duty, an administrative inspector comes across irregularities that derive from insufficient professional competency of a civil servant to perform the duties he has been assigned, the inspector will recommend to the head of the administrative organ to transfer the relevant civil servant to another position (article 85 LA). If an administrative inspector, while performing his duty, determines that a

which entered into by the Parties on 22 and 25 September 2003, the HRC mandate expired on 31 December 2003. This Agreement established the Human Rights Commission to operate between 1 January 2004 and 31 December 2004 within the Constitutional Court of Bosnia and Herzegovina. The Human Rights Commission had jurisdiction to consider pending cases received by the Human Rights Chamber on or before 31 December 2003. As from 1 January 2004, new cases alleging human rights violations are to be decided by the Constitutional Court.

⁴ Official Gazette of Bosnia and Herzegovina no. 32/2000

⁵ *Law on Administration* (Official Gazette of Bosnia and Herzegovina no. 32/02).

law or regulation has been violated, he is obliged to order measures to be undertaken to correct the irregularity (article 87 LA). Citizens, corporations and companies, agencies and other legal entities have the right to address the inspectors in order to protect their rights. They can do it orally or in writing, especially if they complain about delays in resolving their application, or if they are unduly required in the course of administrative procedure to submit certificates that are to be obtained by the official conducting the procedure by virtue of his position, or if the administrative decision was not executed in due time or if they were not provided with aid in exercising their rights and interests (article 88 LA).

Administrative Procedures

State-level authorities decide on administrative cases applying the 2002 *Law on Administrative Procedure (LAP)*⁶, which is similar to the administrative procedure laws in force in the entities. In the FBiH an LAP was passed in 1998 and in the RS in 2000. Differences among them stem mainly from the respective territorial/political organization. Indeed, all of these laws are part of a same practice dating back to the Socialist Federal Republic of Yugoslavia (SFRY) Law of 1956, which in turn was based on the *Law on General Administrative Procedure of the Kingdom of Yugoslavia* of 1930, which represented a development of the Austrian Law on Administrative Procedure of 1925. Concerning the capacity in the application of the LAP, it is to be noted that the practice of administrative decision-making in State institutions is far from sophisticated.

The cantons have produced their own legislation, which often is not aligned with the entity and state legislation. The existence of numerous and different laws and regulations on administrative procedures at state, entity and canton levels impinges upon the rights of citizens, legal certainty and ultimately on the rule of law. The *Law on Administrative Procedures* for FBiH explicitly allows the setting up of special procedures for certain administrative domains. Despite the common roots of law in the various jurisdictions, the international donor community, through its assistance programmes and its leadership role, has worsened the divergence in the development of legal frameworks.

General versus Special Procedures: the State-level system of administrative decision-making is based on a general *Law on Administrative Procedure* providing patterns of action for the administration to follow, and a set of guarantees for the parties involved. Apart from acting as a standard guideline for responsible officials, the LAP should also be a major instrument for promoting legal certainty in the relations between the administration and the public. Although the subject-matter dealt with may vary, the phases, deadlines and criteria involved can be regularly expected to be the same as those indicated in this general law.

This, however, is subject to exceptions. State-level institutions apply in fact the LAP (procedural law) in all matters, unless the specific piece of legislation defining the issues to be decided (material law) provides for a departure from the general procedure. In such a case the latter is applied on grounds of *lex specialis*. A coherent approach to the management of the administration's competences suggests that the amount of speciality should be kept confined to what is strictly required by the subject, with the LAP continuing to apply by default for all other aspects. Other procedures depart from general rules, particularly by establishing special deadlines. In these cases, the deadline can at times be less favourable to the parties than the one established in the LAP. In addition there may be a rulebook to provide additional details, which further contributes to legal uncertainty.

Special extended deadlines for the rendering of decisions can be obtained from the Communications Regulatory Agency (CRA). According to the *Law on Communications* (Official Gazette of BiH, no. 31/03), the CRA applies the LAP unless stipulated otherwise by the Law on Communication. On the other hand, an especially shortened deadline for the submission of appeals can be obtained from the Directorate of Civil Aviation. The key reference is the *Law on Aviation of BiH* (Official Gazette of BiH, no. 2/04), which in its Article 80.6 states that the appeal against an order issued by the Disciplinary Commission can be filed with the Ministry for Communication & Transport within 8 days from the day the addressee received the written order or measure, which is shorter than the 15 days in the LAP. These discrepancies do not seem to have any really justified or sound motivation.

General administrative procedures legislation needs to be reviewed and adapted to democratic requirements, and at the same time special administrative procedures should be abrogated and limited to the absolute minimum to increase transparency of the public administration.

⁶ Official Gazette of Bosnia and Herzegovina no. 29/02

Parties and hearing: Article 133 of the State-level LAP provides in this respect for a special examination procedure, to be conducted when necessary to establish facts of importance for the decision, or in order to give the parties a possibility to present their claims, evidence and arguments. It is a general rule that the deciding authority has to hear the parties in cases where two or more parties are involved, when an on-site inquiry has to take place, or when a witness or expert witness has to be heard. In practice, however, this procedural requirement may or may not be complied with, much being left to the evaluation of the official responsible for the procedure.

Thus the hearing can in general be excluded when the authority considers that it has sufficient information to take a lawful decision - mostly in the case of simple, "one-party" procedures - or when the party has submitted its position in writing. Besides, Art. 132 of the State LAP provides for a summary procedure, also known as "shortened" procedure, in the course of which the responsible official is not bound to hear the parties. The cases in which this is allowed are quite wide-ranging, being motivated *inter alia* by the sufficiency of the initial evidence, including when the facts are generally known, or can be established on grounds of official documents; by specific provisions allowing a decision on grounds of mere probability; and obviously by the urgency of the decision. Cases of summary procedures based on various grounds are indeed quite numerous in the State administration for the expediency of those taking the decision, even if they entail reducing the procedural guarantees of the parties.

There is one specific case of empowerment of the attorney general to act "as a party" in administrative proceedings. In terms of both the LAP and the 2002 *Law on Public Attorney of BiH*,⁷ the Attorney General can be a party in administrative proceedings (Art. 44 LAP) and is entitled to file an appeal for the purpose of representing the interests of the State public administration (Art. 213 LAP). The Attorney General, furthermore, is empowered to represent the State administration in entity-level administrative proceedings, which is part of his advisory and legal representation role. Still, it is somewhat anomalous that, whenever these administrative proceedings end up in actual court litigation, the Attorney General's empowerment is made dependent on a special authorization of the administration concerned (article 13-5 of the Law on Public Attorney).

Motivation of decisions: As a rule, administrative decisions are always provided in writing and are accompanied by a written statement of reasons. Oral decisions are rare and limited to cases of extreme urgency - one was found in the *Law on Veterinary Service in BiH* (Official Gazette BiH no. 34/02), where Article 89-4 provides for an oral order to be issued by the veterinarian inspector to prevent danger to people or animals. Typically, this order also has to be confirmed in writing within three days of being verbally issued. The written form of the decision and its motivation are indeed what allows the decision to be challenged in the second instance and, if necessary, in court. It is in the motivation that one would expect to find all indications of the evidence considered by the responsible official, including any hearing of parties and other interested persons which may have taken place. In general terms, the quality of the motivation is the best indicator of the quality of the decision-making process in general. The quality of these motivations appears to vary greatly, however, in practice: it is not rare for the reasoning to be essentially limited to little more than a reference to the material legislation in which the empowerment to decide is to be found. While this may be sufficient in the simplest cases, in others considerably more should be provided, especially if the decision is negative in terms of the interests of the applicant, as a basis for second-instance decision-making and, ultimately, for possible court litigation.

Administrative appeals and review: The type and number of instances are key indicators of the fairness of the procedure, which is a constitutional requirement in BiH. In the vast majority of cases, second instance decision-making is vested in an independent body or at least in an organizational unit maintaining a large degree of autonomy (separate budget user, having position of separate legal entity, with its own stamp, etc.). An example is that of the Veterinary Office of BiH, which is organizationally dependent on the BiH Ministry for Foreign Trade and Economic Relations; or that of the Agency for Civil Aviation, which is placed under the Ministry for Transport and Communication. In the majority of cases the administrative review procedure starts upon the request of an individual or public institution (e.g. Ministry of Human Rights and Refugees concerning the awarding of benefits for return and reconstruction programmes, etc.), while only in some cases does it commence also *ex officio*, especially used by the Ministry of Justice or the Veterinary Office of BiH. Eventually, a few authorities institute administrative review proceedings upon their own initiative, *ex officio*, or also upon the initiative of a superior public authority or at the suggestion of the prosecutor or other public body, such as the Border Police or the Ministry of Security.

⁷ Official Gazette of Bosnia and Herzegovina no. 8/02

There are a few cases in which administrative decisions are rendered in a single instance only, and are therefore immediately challengeable in front of the competent court. One such case is under the *Law on Measurements of BiH* (Official Gazette of BiH no. 19/01) which in its Articles 12, 24, 35, and 39 provides for direct judicial recourse, expressly stating that an administrative appeal in the second instance is not allowed. Likewise, in the application of the *Law on Conflict of Interest* parties have the right to challenge a first-instance decision of the BiH Election Commission directly before the Court of Bosnia and Herzegovina (Article 19 of the Law), without any intermediate administrative review, which is rather anomalous for BiH. Confirming the anomaly, in applying the *Law on Financing of Political Parties* (Official Gazette of BiH no. 22/00, Article 16) decisions by the same Central Election Commission are reviewed by the Commission's Appellate Council, before an appeal is lodged in court for judicial review. Administrative decisions are enforced by both administrative bodies and competent courts, depending on the type of obligation placed upon the party by the administrative decision.

Decision-makers' accountability and delegation: Administrative decision-making in BiH is characterized by a tendency to verticalism: all decisions tend to be formally taken by the top of the organization, i.e. the minister or director, or other top officials in the institution. The head of an agency is expected to sign each decision issued, and the possibility for the top official to delegate responsibility for final decision-making is not a feature of the procedure as usually conducted. It is almost only used in case of temporary absence of the incumbent from office. The top official retains therefore ultimate responsibility towards the "outside" world for the entire decision-making process. This means that although the LAP requires that in each institution an official is designated as responsible for conducting the procedure, the delegation is limited to carrying out all activities preparatory to the final decision itself.

Officials responsible for the procedure do not sign the final decisions, although in some cases they may include their initials in the margins when preparing the text for their superiors. Their accountability remains therefore an "internal" one. In case of wrong or inappropriate decisions, which may result in damage for the public or for the institution concerned, the responsibility has to be demanded from the inside, through the hierarchical subordination link that makes the official responsible for conducting the procedure accountable to the top manager in the institution.

Under the present set-up, what could and should be done is to at least put into operation the indirect accountability mechanisms that the system already provides for. For this purpose, the LAP expressly sets forth monetary sanctions for the violation of its key provisions, and this applies not only to the institution, but also to the official responsible for conducting the procedure.

Additionally, the instrument of disciplinary action can be used for exacting accountability within each institution. However, in spite of this being the only tool available until now, it was not possible to discover a single case of disciplinary action having been conducted against any official for misuse of his/her position, or for a serious mistake committed in the course of the procedure. The same is true for cases of material responsibility, by which a civil servant may be required to refund losses incurred by the administration as a result of his/her wrongdoing or maladministration.

It has to be noted that the laws on administrative procedures, at the BiH level as well as at the entity level, are routinely violated by public authorities either on purpose or out of ignorance, as can be deduced from the reports produced by the ombudsmen at all levels. Most of the recommendations contained in those reports refer to the ignorance on the part of the authorities of basic organisational regulations, such as identification of the competence to act, procedural regulations resulting in blatant violations of legal guarantees of citizens, and substantive law. It seems that these shortcomings appear in all administration settings, from municipal level to state level.

The three laws on administrative procedures need to undergo a thorough review in order to be harmonised or better unified and adapted to general European principles, in particular with regard to transparency, guaranteeing the hearings of the parties, legal certainty, and discretion. Special administrative procedure laws will have to be reduced to the absolute minimum.

Freedom of Access to Information

Another key indicator of quality decision-making is the way in which the procedure is "open" to scrutiny by those concerned - an aspect in which the central question concerns the right of access to administrative documents and the way in which this right of access to information is balanced with the legislation on state secrets and privacy protection.

The relevant practice, which is a main indicator of the *transparency* of administrative decision-making, appears to be subject to a double form of regulation in the State administration, which results in a lack of clarity as to the applicable normative framework. On the one hand, access to administrative documents is regulated in Article 72 of the LAP. As in most systems with similar legislation, a party in the proceedings can at any stage request the responsible official to disclose the information contained in the file (i.e. pertaining to the procedure itself). This request, which can be made verbally, results in the right of the party to access the file and to obtain at his own expense copies of the documents collected - obviously provided that their content is not officially classified as a secret protected by legislation (e.g. State, military, and business secrets, or personal data of others).

On the other hand, the Parliamentary Assembly of BiH enacted in 2000 a separate *Law on Free Access to Information in BiH*, a title under which in other jurisdictions basic principles of administrative procedure are often established. The purpose of the same law in BiH, however, is considerably wider, since any member of the public can, through a written request, obtain free copies of any information held by the administration within a deadline of 15 days - obviously apart from the usual exceptions. It is apparent that the definitions of the entitled party and of the accessible information are so broad as to seriously put in question whether administrative procedure is really the point of the law. The objective appears rather to be that of a general law on transparent government, addressing the needs of the general public and the press, quite apart from any concern for administrative decision-making in specific cases.

While this Freedom of Information Act did establish a new procedure to access government-held information, it did not introduce new principles of administrative procedure in the general sense. Concerning access to the file within a procedure, the matter was already regulated in the pre-war LAP, as it is now in the new LAP enacted at the BiH level. The modalities of access set out in that law, moreover, are clearly less burdensome for the parties - no need for the request to be written and no long deadlines for the receipt of an answer.

The law specifies three categories of information that may be exempt from publication or disclosure. The first regards the functions of public organs (when publication would cause "considerable damage" to "legitimate aims" of foreign policy, defense and security interests, as well as protection of public security, monetary policy interest, prevention of crime and detection of crime, and protection of the decision-making process). The second category of exemptions refers to protection of commercially sensitive information of a private company or third person, whilst the third category of exemptions stipulates protection of another person's privacy. In accordance with this third category, public organs shall in principle refuse to provide information on other persons. Information within these three categories, however, is not generally exempt. A decision on exemption is made case by case, after a test to examine public interest with regard to each individual request. That test means that a public body is legally obliged to assess whether the disclosure of the requested information will benefit the public or will damage it.

The state level and the entities have passed laws on the freedom of access to information. A *Freedom of Access to Information Act* was passed by BiH (state level) in 2000 (no. 28/2000) and in 2001 in the entities (FBIH no. 32/2001; RS no. 20/2001). These laws conform to international standards and oblige public authorities to facilitate and encourage the prompt disclosure of information.

The protection of personal data and the right to receive all of one's own personal data gathered by public authorities are guaranteed by the Constitution and by general legislation. The Law on the Protection of Personal Data (BIH no. 32/01) includes in its scope, according to article 2, the public bodies in FBIH and RS insofar as there is no special further-reaching legislation in force in the entities.

The BiH law implementation is insufficient and institutions tend to ignore the requests for information coming from citizens and NGOs.

Judicial Review of Administrative Acts

Judicial control of administrative acts at the state level is provided for by the 2002 *Law on Administrative Disputes of Bosnia and Herzegovina* (LAD).⁸ The right to initiate an administrative dispute belongs to, *inter alia*, a citizen or legal entity, whose right or direct personal interest has been violated by a final administrative act. This right is also granted to civil servants if the final administrative act has violated their rights deriving from their civil service status and labour relations, as well as to groups representing collective interests (associations, foundations, corporations, trade-unions, etc.) if the final administrative act violated

⁸ Official Gazette of BiH no. 19/02

their rights or collective interests. The procedure can also be initiated by the Ombudsmen, in the event that the final administrative act has violated human dignity, constitutional rights and freedoms of citizens (article 2 LAD). Decisions of the Court of Bosnia and Herzegovina (the one that is competent to try the cases) are final and binding (article 3 LAD). The court does not have full jurisdiction. Administrative disputes can be initiated solely against the final administrative act (article 8 LAD). Administrative disputes shall be initiated by filing a lawsuit with the competent court within 30 days of the date of delivery of the disputed decision (article 19 LAD).

The administrative disputes legislation will need to be unified for the whole country and amended so as to allow the full jurisdiction of the court in cases where administrative discretion is not allowed in the administrative decision-making procedure.

Quality of Legislation

The Council of Ministers of BiH (CoM) and the Presidency of BiH on the state level adopted a joint *Declaration on Improving the Quality of Regulation* in June 2002. The document compiled the existing legislative drafting techniques within the BiH administration and tasked a small working group to develop a set of uniform rules that would guide the process of preparation of normative texts.

The BiH Parliamentary Assembly passed *Uniform Rules for Legislative Drafting (Uniform Rules)* in January 2005. Initially the *Uniform Rules* were applicable only at the state level of BiH, but BiH Parliamentary Assembly recommended to other levels of government in BiH to pass the same set of rules. Both entities have passed rules with almost the same content.

The *Uniform Rules* provide for obligation of proponents of legislation to provide information on the constitutional and legal grounds for the introduction of the regulation, explanation of the policy opted for, level of harmonization of the regulation with European legislation, mechanisms of implementation and manner of ensuring observance of the regulation, description of consultations carried out in the process of drafting the regulation, and time-frame of potential revision of the introduced regulation. The *Uniform Rules* set a requirement for each ministry and other administrative body at the state level of BiH to establish either a “unit for normative affairs” comprised of two or more civil servants with special competence in drafting and processing normative acts, or of a workplace of “specialists on normative affairs”, who are explicitly competent in drafting normative acts. Almost no ministry or other administrative body at the state level has complied so far with this requirement. The BiH Ministry of Justice established the *Sector for Strategic Planning, Aid Coordination and EU Integration* at the end of 2006, but there is no specific unit within BiH state-level ministries for conducting impact assessment.

The Legislative Secretariat has 23 staff foreseen in the systematization, but actually it has only five lawyers and three more under recruitment procedure. The Secretariat reviews all legal acts before forwarding them to the CoM for adoption. In 2007 these were 1067 laws, 199 different legal documents, 430 pieces of advice to the government. On four occasions the Secretariat advised a ministry during the drafting of a new law. The drafts submitted to the CoM are of mediocre quality. Often there is too little time due to political pressure so that the drafting quality suffers. At the same time the objectives/goals of new legislation are not clearly defined and therefore a draft may in the end not meet the targets or may even be counterproductive.

Legislative drafting at State level is often done by staff with legal background and/or qualifications within ministries and other administrative bodies, while sometimes experts from outside the public administration are engaged in drafting the texts of regulations. Also, several persons of both types may work together in working groups established by the competent minister on an *ad hoc* basis, or established by the Office of the High Representative (OHR). There is neither specialized staff in charge of policy making and impact assessment nor any specialized staff in charge of and dealing with legislative drafting. As a matter of fact, the prevalent opinion in ministries and other administrative bodies is that any lawyer is capable of perform these tasks and duties, even if he/she has not undergone specialized training. Moreover, training in law-drafting is not delivered on a regular basis but rather on an *ad hoc* basis.

The BiH CoM passed the *Regulations on Consultations in Legislative Drafting*, elaborating the consultation process in a more specific way. These Regulations differentiate between legislation having significant public impact (for instance, legislation effecting changes of legal status of a citizen, or changes in economic status, legislation conforming to international standards, legislation affecting the environmental issues) and legislation with insignificant public impact (for instance, amendments for the purpose of correcting spelling errors or grammatical mistakes in legislation that has already entered into force, legislation codifying or otherwise consolidating, reorganizing or altering provisions to different sections of the same piece of

legislation without bringing about a substantive changes). The latter type of legislation is not subject to consultations. The regulations establish the procedures for consultation with the public in general and with other organizations, which are to be applied by all public administration institutions at the state level.

The regulations failed to set up the obligation for proponents of legislation to commence the consultation process early in the policy development stage. It does provide for the consultation process to commence once the legislative draft is being developed. The deficiencies, inconsistencies and shortfalls indicated here can be spotted at all government levels in BiH. Therefore, under this subdivision of the report related to entities, not much will be said. In fact, consultation during the drafting process is insufficient. Consultations with NGOs remain very unusual.

Checking the legislation in regard to the harmonization with the *acquis communautaire* is a joint responsibility of the Legislative Secretariat and the Department of European Integration. The Legislative Secretariat is expected to increase its staff by 10 in order to carry out checks of harmonization.

The discussions of legislation and respective amendments in parliament are very political, and as parliament rarely consults with the proponent ministry or the Legal Secretariat may dilute or destroy the objective of the law and/ or lead to very costly implementation or to no implementation at all.

II – FEDERATION OF BOSNIA AND HERZEGOVINA

Distribution of Competences and Organisation of the Administration

The law that regulates organization of the administration in the FBiH is the 2005 *Law on the Organization of Administrative Organs in the Federation of Bosnia and Herzegovina*⁹. The law regulates the organization and functioning of administrative organs in the FBiH, encompassing the status, role, organization, competences and obligations in performing administrative and other activities, internal relations of the administrative organs and relations of administrative organs towards citizens, executive and legislative power, Ombudsmen, companies and other legal entities, as well as other issues of importance for organization and work of the administration at all levels in the FBiH.

According to this law, administrative bodies are obliged to ensure the efficient and complete exercise of rights and liberties of citizens that are provided for in the Constitution of the FBiH, and documents set forth in Annex to the Constitution of FBiH (article 3). Decisions of administrative bodies are based on the principles of legality, administrative transparency, efficiency, economy, professional impartiality and political independence, unless some of these principles are otherwise provided for by law (article 4).

The key law regulating competencies of the administration in the FBiH is the 2003 *Law on Federal Ministries and other Organs of the Federal Administration*, as amended in 2005 and 2006¹⁰, which establishes federal ministries, as well as administrations and administrative organizations within the ministries. The law also determines their scope of work and regulates other issues that are of importance to their organization and functioning (article 1).

With regard to material legislation, the situation is the following: on the one hand the BiH Constitution leaves to the institutions of FBiH all of the responsibilities not expressly assigned to the Common Institutions of BiH while, on the other hand, the progressive implementation of the constitutional set-up has somehow resulted in overlapping or shared competences among entity and State institutions. In the transfer of certain competences towards the State, it may happen that State institutions lodge appeals against FBiH decisions, as has happened, for instance, in the area of civil aviation or in matters concerning foreigners, or personal documents.

The same phenomenon is to some extent replicated in the relationship between the FBiH and the ten federated cantons. While Chapter III of the FBiH Constitution provides the cantons with relevant exclusive responsibilities, others are shared between them and the Federation (e.g. social welfare, health, environment), resulting in some degree of overlapping legislation. Against this background, there are cases in which FBiH institutions decide on appeals against decisions taken by the cantons (e.g. change of entity citizenship, based on powers delegated by the Federation, and issuance of work permits to security agencies, both of which are decided by the cantonal Ministry of Internal Affairs).

On the contrary, in the area of *procedural law*, the relationship between levels of government is asymmetric. The Constitution of BiH departs from the Yugoslav tradition, according to which codes of procedure were set at the federal (SFRY) level for all federated republics. Thus, the FBiH has its own *Law on General Administrative Procedure* (1998), which is separate from and even pre-dates the analogous one for the State administration (2002). Within the FBiH itself, however, the traditional Yugoslav approach has prevailed: even in the absence of fully explicit constitutional provisions, the same FBiH law governs general administrative procedure at the level of both the Federation and the cantons, the latter not having enacted legislation in this area.

This solution has practical and legal advantages, not only because it ensures the uniformity of standards in the protection of the rights of parties to administrative procedures throughout the FBiH territory and allows for an easier management of the procedure across government levels, but also because it enables a single FBiH Administrative Inspectorate to promote uniform standards of service across the whole FBiH territory, regardless of the administrative subdivisions that exist. This approach, unfortunately, has not taken root in BiH as a whole, and as a result legal certainty and the rule of law throughout the country have been put at risk, thereby impairing investment and economic development.

Currently, within the FBiH and the cantons, the distribution of competences has been carried out at only a very general level, within pieces of legislation dealing with the general organization of the executives - such as the already mentioned Law on Ministries and Other Bodies of the Federation Administration. The

⁹ Official Gazette of the Federation of Bosnia and Herzegovina no. 35/05

¹⁰ Official Gazette of the Federation BiH nos. 19/03, 38/05, 2/06, 8/0, 61/06

expectation of such legislation offering at any time a complete, detailed and consistent distribution of competences is not realistic: the description of responsibilities contained therein is not only general, but can at times also become obsolete as new legislation is enacted. Additionally, the existence of material legislation at other government levels resulting in the overlapping of decision-making is a reality, particularly between the Federation and the cantons.

Principle of Legality

Organs and institutions that have competencies in administrative matters are obliged to take decisions and undertake actions on the basis of law and regulations, as well as in reference to internal rulebooks of the institutions. In administrative matters in which administrative bodies may take decisions based on discretion, such a decision has to be made within the limits of the legal mandate and in accordance with the aim for which the mandate was given (article 4 LAP). As for the remaining aspects of the principle of legality, all that has been indicated above regarding this principle at the State level applies here as well.

Accountability Institutions

Ombudsman

One of the institutions that were introduced by the 1994 FBiH Constitution is the Ombudsman of the Federation of Bosnia and Herzegovina. There are three Ombudsmen appointed by the Federation's parliament in accordance with the Federation law, i.e. one Ombudsman appointed from among each of the constituent peoples: Bosniak, Croat and Serb and one representing other ethnic groups (article 9 of the Law on Ombudsmen FBiH), which excludes a non-ethnic individual from being appointed as Ombudsman.

The Ombudsmen are to protect human dignity, rights, and liberties as provided for in the Constitution, in the instruments listed in the annexes thereto, and in the constitutions of the cantons. In particular, they have to act in such a way as to reverse the consequences of the violations of these rights and liberties and especially of "ethnic cleansing". In carrying out their functions, the Ombudsmen must be guided by law and by the principles of morality and justice.

The Ombudsmen are independent in carrying out their functions, and no person or governmental organ may interfere with such functions. The Ombudsmen are entitled to examine the activities of any institution of the Federation, canton, or municipality, as well as of any institution or person by whom human dignity, rights, or liberties may be denied, including by accomplishing "ethnic cleansing" or preserving its effects.

Additionally, the Ombudsmen are entitled to initiate procedures in competent courts and to intervene in pending procedures as well as to receive the assistance of the Judicial Police. As such, the Ombudsmen may examine all official documents, including secret ones, as well as judicial and administrative files and require any person, including any official, to cooperate, in particular by providing relevant information, documents, and files. Ombudsmen may also attend court and administrative hearings, as well as meetings of other organs, and may enter and inspect any place where persons deprived of their liberty are confined or work.

Ombudsmen submit an annual report to the Prime Minister, to the Deputy Prime Ministers of the Federation, and to the OSCE. The Ombudsmen may also present at any time special reports to any competent Federation, cantonal, municipal, or international authorities, to which the domestic institutions are obliged to reply within a time limit specified by the Ombudsmen.

Administrative Inspection

In the administrative tradition that BiH inherited from the former Yugoslavia, administrative inspectorates play an important role in ensuring the accountability of administrative decision-makers. Coming from outside the institution, the inspector is in charge of verifying the respect of the basic systems of rules governing the administration, starting from the LAP. In doing so, the inspector is able to investigate possible problems in the internal chain of responsibility, pointing to errors and violations that would otherwise go unpunished, and sanction those violations or file a request for the prosecutor to institute a procedure for misdemeanour or criminal offence. In relation to officials responsible for administrative decision-making, administrative inspection promotes internal accountability. both in a preventive way (decision makers are aware that they can be subjected to inspectors' scrutiny) as well as through the issuing of punitive sanctions.

Inspection is regulated in the 2005 *Law on the Organization of the Administrative Organs of the Federation of Bosnia and Herzegovina*.¹¹ According to this law, administrative inspection is carried out by the federal administrative inspectors (article 138). A person may be appointed inspector if he fulfils the following criteria: law degree, expert exam and at least 3 years of experience in the most complex administrative matters.

According to article 139 of the law, administrative inspectors, while performing supervision over the implementation of laws and regulations, determine facts pertaining to the following: 1) observance of the administrative procedure deciding upon applications of citizens and legal entities in the course of first and second instance procedures; 2) observance of laws and regulations on state administration pertaining to the organization and functioning of the administrative bodies and administrative organizations (Rulebook on internal organization); 3) observance of laws and regulations on labour relations of civil servants and other employees in the administrative organs and administrative organizations, as well as employment criteria related to education and other conditions to be met by officials involved in decision-making in legal entities entitled with public authorizations; 4) timeliness in administrative first and second instance decision-making; 5) correct application of procedural rules provided for in the Law on Administrative Procedure; 6) way of collecting evidence in the course of an administrative procedure, especially evidence obtained by the official conducting the procedure *ex officio*; 7) timeliness in the execution of an administrative decision; 8) whether citizens and legal entities are given aid to exercise their rights and interests; 9) keeping accurate records of first and second instance administrative procedures; 10) application of rules of office management.

If a federal administrative inspector determines that violations of federal laws and regulations prevent citizens and legal entities from the timely exercise of their rights and interests, or in any other manner obstruct the realization of those rights, the inspector is obliged to inform the Government of the Federation, cantonal government or mayor, and to submit to the consequences of such a state of affairs. The inspector shall require the above mentioned institutions to undertake adequate measures falling within their competences in order to correct the irregularities (article 142). Citizens, corporations and companies, agencies and other legal entities have the right to address the inspectors in order to protect their rights. They can do it orally or in writing, especially if their applications are not decided in timely manner, if they are required in the course of an administrative procedure to submit certificates that are to be obtained by the official conducting the procedure by virtue of his/her position, if the administrative decision has not been executed in due time, and if they have not been given aid to exercise their rights and interests (article 143).

Administrative Procedures

Following the general considerations, the present section reviews the specific features concerning individual aspects of administrative decision-making in the Federation and in cantonal public administration institutions.

General and special procedures: In the Federation, including the cantons, administrative decision-making system is based on the *Law on Administrative Procedure (LAP)*. Apart from acting as a standard guideline for responsible officials, the LAP should also be an instrument of legal certainty in the relationships between the administration and the public. Although the subject-matter of the decision may vary, the phases, deadlines and principles involved are as indicated in this general law, but there are exceptions. Institutions of the Federation and cantons apply in fact the LAP, which is general procedural law, in all matters unless a specific piece of legislation defining the issues to be decided (substantive law) provides for a certain departure from the general procedural rules. In that event, the latter is applied as *lex specialis*.

When deciding on administrative cases, the Federation and cantonal public administration authorities apply the 1998 *Law on Administrative Procedure*¹², as amended in 1999, which is similar to the administrative procedure laws in force in the RS (2000) and BIH (2002). Differences stem mainly from the diverse territorial/ political set-up. The peculiarity of each government sub-system having its own LAP may of course result in the application within the same area of different texts governing the general procedure, since different sub-systems may have peripheral offices. As mentioned above, the FBiH and cantonal institutions apply the LAP (procedural law) unless specific legislation defining the issue to be decided (material law) provides for departures from the general rules. In such cases, the exceptions apply as *lex specialis*. Obviously, a coherent management of the administration's competences requires that the amount of speciality be limited to the strict minimum required, with the LAP continuing to apply by default for all other aspects.

¹¹ Official Gazette of the FBiH, no. 35/05

¹² Official Gazette of the Federation of BIH nos. 2/98, 48/99

The application of this concept, however, meets with some problems in the FBiH and cantonal institutions, as a result of various factors. On the one hand, the creation *ex novo* of a legal system has required a large amount of material legislation to be produced by the Federation and by the ten cantons in less than a decade. On the other hand, a fair portion of this legislation was developed under the influence of foreign specialists, who may have not have been familiar with requirements under the LAP. As a result, the actual need for possible elements of speciality may not have always been carefully evaluated.

There are a few cases in which material legislation has introduced exceptions, without the reasons being fully clear. At the other levels, most of these cases concern legal deadlines. For instance, the *Law on Tax Administration of the FBiH* (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 33/02, article 76), provides for a deadline of 8 days to file an appeal against decisions establishing additional tax obligation. Similarly, just to give an example from a completely different field, the *Law on Agencies for Protection of People and Property* (*Official Gazette of the FBiH* no. 50/02) also provides an 8-day deadline for appealing to the FBiH Ministry of Internal Affairs against decisions of a cantonal Ministry of Internal Affairs rejecting an application to attend training. Under the same law, Article 48 contains a special 10-day deadline for appealing the decision of an inspector in the FBiH Ministry of Justice, which is also atypical under the FBiH LAP.

Parties to the procedure: According to article 121 of the LAP, an administrative procedure is initiated by the competent institution *ex officio* or when requested by a party. As far as FBiH-level first instance procedures are concerned, the request by a party is the starting point before three institutions, namely the Ministry for Urban Planning and Environment, the Ministry of Justice, and the Ministry of Trade. In the remaining FBiH institutions (13 of them), the procedure may start either upon the request of a party or *ex officio*.

Cases in which consultations are required for the very start of the procedure are quite rare, as observed at other government levels. The FBiH LAP, in its Article 48, defines a party as a person upon whose request a procedure has been initiated, or against whom a procedure is being conducted, or who has the right to participate in a procedure for the sake of protection of his rights or legal interests (i.e. the law relies on the usual distinction between active, passive and auxiliary parties). Within these different roles, the notion of a “party in the procedure” is typically very broad, however: according to the LAP any person or legal entity who may be the holder of rights or interests can be a party in the procedure. This includes not only individuals, but also trade unions, business units of a company, a settlement, a group of persons, etc., even if they do not have the capacity of a legal entity. Particularly when tasked under their statutes with the protection of rights and interests of their members, such organizations can submit a request on the members’ behalf, as well as take part in an already initiated procedure with all the rights of the party.

Additionally, the LAP allows administrative bodies to be a party in administrative procedures involving the interests they embody. This is especially foreseen by the LAP for prosecutors, public attorneys and other government authorities. In the case they are authorized under the law to represent the public interests in an administrative procedure, they have, within the limits of their powers, the rights and duties of a party (Article 51). A separate case is that of the FBiH Ombudsmen institutions which, in order to protect the dignity, rights and freedoms of citizens, are able to intervene in the procedure at any stage and up to the passing of a final court decision, as well as in the procedures of extraordinary legal remedies (Article 49 of the LAP).

Hearing: According to article 147 of the LAP, an official conducting a procedure shall schedule a hearing, either at his initiative or on a party’s request, in any case when it is useful for the resolution of the matter; a hearing has to be scheduled in cases involving two or more parties holding opposite interests, or when it is necessary to investigate or hear witnesses or experts. The hearing is public, with the exception of when an official conducting the procedure may exclude the public during an entire hearing or for only a part thereof. Exclusion of the public does not refer to the parties involved, their proxies and expert aids. In such cases, producing punctual recommendations is impossible without close examination of the merits.

However, the constant recourse to the summary procedure is eroding the guarantees of the parties: even if parties obtaining a favourable decision can be expected to be satisfied with a shortened delivery time (15 instead of 30 days from the start of the procedure, article 216), the use of shortened procedures may also have the undesired effect of excluding the hearing of additional parties who may have a legitimate interest in the matter.

Administrative appeals: The type and number of instances are one of the key indicators of the procedure’s fairness, which is a constitutional requirement due to the incorporation by the BIH Constitution (Article II. 2) of Article 6 of the ECHR. In this respect, staff within the FBiH administration share with the other administrative sub-sets in BIH a very minimal knowledge of the relevant case law, not only the case law from Strasbourg, but also that of the BIH Human Rights Chamber (see above). The following paragraphs are

devoted to a few remarks concerning specific aspects of the procedure, starting with the making of the first-instance decision.

Decision-makers' accountability and delegation: In the FBiH and cantonal administrations, as in most other administrations coming from the central and eastern European tradition, administrative decision-making is characterized by a tendency to “verticality” - i.e. all decisions tend to be formally taken by the head of institution (e.g. minister or director, or other top official within the institution). However, a specific feature of the FBiH LAP - which is for the most part not found at the other government levels – is the possibility for the top management to delegate not only the power to conduct the procedure leading to the decision, but also the power to make the decision itself (Article 36 LAP). This element, together with the fact that any official delegated to conduct the procedure is empowered to sign the draft decision provided to the top management (Article 203 LAP), contributes to creating an increased potential for greater accountability.

However, although the possibility of full delegation is not excluded, such cases are rare and the principle that decisions are formally “made” by the top management still very much prevails in practice. In the large majority of cases, delegation is limited to carrying out activities preparatory to the final decision itself. This means that the accountability of officials responsible for the procedure remains confined to internal hierarchical mechanisms of answerability. In the case of wrong or inappropriate decisions that may result in damages caused to the public or to the institution concerned, responsibility has to be claimed through the hierarchical subordination link, which makes the official responsible for conducting the procedure accountable to the top manager in the institution.

Motivation of decisions: Administrative decisions should always be delivered in writing and accompanied by a written statement of reasons. The written form of the decision and its motivation are indeed what allows the decision to be challenged in the second instance and, if necessary, before the competent court. It is in the motivation that one would expect to find all indications of the evidence considered by the responsible official, including any hearing of parties and other interested persons which may have taken place. Also, the decisions of the courts (cantonal courts and the Federation Supreme Court) may point at common mistakes made in the course of both first and second instance procedures, just as they may draw attention to jurisprudence pertaining to a particular administrative issue. In general terms, the quality of the motivation is therefore an important indicator of the quality of the decision-making in general and may serve as a specific instruction on the focus of attention while deciding an administrative matter.

Formally, the Federation and cantonal institutions in almost all cases declare that they comply with the requirement to fully motivate their decisions. However, the quality of these motivations appears to vary greatly: sometimes the reasoning can be essentially limited to a reference to the material legislation in which the competence to decide is to be found. While this may be sufficient in the simplest cases, in others considerably more could be needed to provide a basis for second-instance decision-making and, ultimately, for possible court litigation, especially if the decision is negative with regard to the application of the party. Still, the Federation and cantonal public administration institutions generally distinguish between the simple, standard administrative decisions and more complex decisions, which are more time-consuming when it comes to producing them in writing - and this follows from the difference allowed by the LAP itself, with the choice of different deadlines for rendering the decision. Motivation should include an instruction on legal remedies. It should be kept in mind that quality in first-instance motivations is important, since it limits the chances that second-instance decision-making bodies (or the courts) may have of striking down a decision on the grounds of the lack or insufficiency of motivation.

Envisaged reforms: According to the Ministry of Justice FBiH, there is now an advisory team under the national Public Administration Reform Co-ordinator (PARCO) to review and change the administrative decision-making system in line with the PAR Strategy and Action Plan. A project to assist in this work has been prepared by the working group. This proposal will now need to be signed by all ministers of Justice and then by all governments of FBiH. The first stage in that project will be the screening by an expert group of the administrative procedure laws and linked regulations. It is foreseen that the implementation of the law will continue to be supervised and controlled by the administrative inspection.

Freedom of Access to Information

Another key indicator of quality decision-making is the way in which the procedure is “open” to examination by those concerned - an aspect in which the central question concerns the right of access to administrative documents. The relevant practice, which is a main indication of the *transparency* of administrative decision-making, appears to be subject to a double form of regulation in the Federation administration, which results in a lack of clarity as to the applicable normative framework.

On the one hand, access to administrative documents is regulated in article 79 of the LAP. The Article envisages that parties have the right to review case file documents and to transcribe certain documents at their own expense while the administrative organ is obliged to facilitate it. Documents are to be reviewed and transcribed under the control of a designated official. Also, any other person who proves his legal interest to do so, has the right to review the documents and to transcribe them at his own expense, as well as a social organization or citizens' association, if there is justified interest to do so. However, there are certain limitations on copying the contents of the case file – minutes on deliberations and voting, official reports and draft decisions, as well as other documents that are considered to be confidential – if by doing so it could hinder the purpose of the procedure, or if it runs counter the public interest or justified interest of one of the parties or other persons. As far as the course of the procedure is concerned, article 79 prescribes that any party and every other person who proves his legal interest in the case, as well as the interested organs, have the right to be informed about the course of the procedure. Eventually, the LAP provides for a remedy to be filed against the decision rejecting the request to look into the case file, but only if a decision has not been issued in writing.

On the other hand, in terms of freedom of information, the applicable law in the Federation of BiH is the 2001 *Law on Free Access to Information in FBiH*¹³, according to which any member of the public can, through a written request, obtain free copies of any information held by the administration within a deadline of 15 days. Under the law, it is apparent that the definitions of an entitled party and of the information accessible are so broad as to seriously put in question whether an administrative procedure is really at stake here. The objective appears rather to be that of a general law on “transparent government”, addressing the needs of the general public and the press, quite apart from any concern for administrative decision-making in specific cases. While this “freedom of information” act did establish a new procedure to access government-held information, it did not introduce new principles of administrative procedure in the general sense. Concerning access to the file within a procedure, the matter has already been regulated in the LAP, as described above. The modalities of access in the LAP, moreover, are clearly less onerous for the parties - no need for the request to be written, and no long deadlines for an answer to be received. It is worth mentioning that the LAP of the BiH (article 6) does not contain the principle of transparency that would establish an obligation for institutions involved in administrative decision-making to act in accordance with the *Law on Free Access to Information*. This may raise contentious issues, unless the relevant legislation is properly amended.

Judicial Review of Administrative Acts

Administrative disputes are conducted before both cantonal courts and the Supreme Court of the Federation of BiH. In some areas these disputes are being used quite frequently – some of the Federal institutions, as well as some cantonal institutions, have a long history of their final administrative decisions being contested before the competent court. Decisions that are final in administrative procedure are open for judicial review before the competent court (cantonal courts and Supreme Court of the Federation, depending on the government level where the decision became final).

Judicial control of administrative acts at the FBiH level is provided for by the 1998 *Law on Administrative Disputes of the Federation of Bosnia and Herzegovina*.¹⁴ The right to initiate the procedure belongs, *inter alia*, to a citizen or legal entity whose right or direct personal interest has been violated by the final administrative act (article 2). The procedure can be initiated also by the Ombudsmen, in the event that the final administrative act has violated human dignity, constitutional rights and freedoms of citizens (article 2). The Public Attorney can also initiate a procedure if the final administrative act has breached the law to the detriment of the Federation, canton, city or municipality represented by the Public Attorney (article 2).

Administrative disputes in the Federation of BiH are decided by the cantonal courts (article 5). They can be initiated solely against the final administrative act (article 8) by filing a lawsuit with the competent court within 30 days of delivery of the contested decision (article 18).

By transferring the responsibility for administrative disputes to the cantonal courts, judgments on similar cases have become very divergent. Predictability and legal certainty have suffered. At the same time, the ordinary remedy – an appeal to the Supreme Court – has been abolished. Now there are only some extraordinary remedies against cantonal judgments that allow for a review by the Supreme Court. Cantonal

¹³ Official Gazette of the Federation of Bosnia and Herzegovina, no. 32/01

¹⁴ Official Gazette of FBiH no. 2/98

courts do not have full jurisdiction with regard to administrative cases and generally still have great difficulty in obtaining the administrative files from the respondent administrative authorities.

Quality of Legislation

As indicated above, the Parliamentary Assembly of Bosnia and Herzegovina recommended to other levels of government in BiH to pass the same set of rules. The Federation has passed rules with almost identical content. In the Federation of BiH (as well as in the Republic of Srpska), the situation is similar to that at the State level. Namely, decision-makers need advice based on a clear definition and good analysis of issues, with explicit indications of possible inconsistencies in the legislation to be enacted. Implementation procedures and monitoring mechanisms must be designed to ensure that policies can be adjusted in the light of progress, new information, and changing circumstances.

The Ministry of Public Administration makes some efforts to reduce red tape and to simplify legislation. However, this concerns mainly the private sector, e.g. simplification of the registry of companies.

According to the amended rules of procedure, line ministries are now primarily in charge of ensuring legal quality and harmonisation with the *acquis*. The Legislative Office double-checks the work of line ministries. The Legislative Office reviews about 1 400 to 1 500 laws per year and it has to deliver its opinion within 8 days. The Office has now 13 staff, of which 8 are lawyers. The office has been given 2 additional lawyers in view of the additional task, namely that of harmonization with the *acquis*. The responsibility for harmonisation with the *acquis* has been given to the Legislative Office as there is no ministry or directorate that could take over the task. Regulations forwarded to the Legislative Office are generally of poor quality and the office has to intervene heavily. The opinion of the Legislative Office is only binding with regard to drafting techniques. However, in 95% of the cases the government also listens to their comments regarding content, impact, side effects, costs, etc. The government has to give reasons if it does not accept the opinion of the Legislative Office. The cooperation of the Office with the Legislative Commission in parliament has considerably improved, which eases their work.

III – REPUBLIC OF SRPSKA

Distribution of Competences and Organisation of the Administration

The fundamental law regulating competencies of the public administration institutions in the Republic of Srpska (RS) is the 2004 *Law on Ministries of the Republic of Srpska*.¹⁵ The law establishes the ministries of RS as republic administrative bodies and organizations; arranges their organization, sets out the rights and duties of ministers, heads of Republic administrative units and Republic administrative organizations, and determines their respective spheres of activity (article 1). According to this law, ministries, Republic administrative units and Republic administrative organizations carry out tasks of the administration of the Republic.

Ministries are defined as civil service bodies, which perform administrative and other activities in one or more administrative sphere of activity; they are not under the supervision of another civil service body, but are directly subordinated to the government. Ministries are responsible for their own organization and management and for the training of their own staff.

Republic administrative units are administrative bodies (e.g. inspectorates) within the ministries, which are established for performing certain activities from within the sphere of activity of republic administration that, because of their nature, require independence and specialized organization. Republic administrative units report to their parent ministry.

Republic administrative organizations are established for performing professional duties and duties of the Republic administration (institutions, directorates, secretariats, agencies, commissariats, funds, centers and other forms). Republic administrative organizations may have separate legal personality. The activities of Republic administration may be performed by Republic bodies (President of the Republic, government and other), as well as by non-state entities (local self-governance units, enterprises and institutions with public authorizations), if the law entrusts such performance to them (article 2).

Ever since the General Framework Agreement for Peace (GFAP) entered into force in 1995, there has been a struggle for competencies between the central government and the governments of the entities. As time was passing, there were more and more competencies attributed to the central government, but many relevant matters were (and still are) mostly left under the responsibility of the entities and their subdivisions. Hence, there was a more or less coherent system of public administration in the RS that has remained to this day. It has been modified only by the decisions of the Office of the High Representative (OHR) amending the BiH constitutional and administrative structure, such as the establishment of an independent, State-level Communications Regulatory Agency, a “joint” Ministry of Defence, a unified State-level Indirect Taxation Authority, and the recent efforts to establish “joint” police forces.

As opposed to the State level where the prevalent role of State institutions was at best - and to a large extent still is - limited to standard-setting through framework-type legislation, the implementation through more detailed legislation and decision-making in individual cases was left to the entity. It has been recognized that the State level administrative bodies, while not producing a high number of first instance decisions, decide in their capacity as second-instance authorities in matters in which the relevant material legislation devolved responsibility for first-instance decisions to the entity/district or subordinate instances.

The distribution of competences is not always clear, however. One assumption is that the attribution of competences should be found in one main organizational law on the structure and scope of work of the executive branch of government, on which the key substantive laws for each policy area would further elaborate. This seems to have been the intention of legislation covering most of the ministries and some of the key agencies and other bodies: the definition of their legal competences is a short proclamation in the Law on Ministries. This approach is not the most practical under the circumstances, however, as it leaves a number of issues unresolved and creates unnecessary conflicts. This pattern has also been observed at the State level.

Principle of Legality

Public organs, self-management organizations and bodies shall decide on the basis of law and regulations of the State authorities, as well as on the basis of self-governing enactment passed by self-management organizations vested with public powers. For decisions on administrative matters in which discretion is allowed by law, public authorities shall decide within the limits of their legal mandate and in accordance

¹⁵ Official Gazette of the RS nos. 70/02, 15/00, 33/04

with the aim for which the mandate was given (article 4 LAP of RS). As for the remaining aspects of the principle of legality, all of the remarks provided with regard to the principle of legality at the State level also apply here.

Accountability Institutions

Ombudsman

The Institution of Ombudsmen (Ombudsmen) was established in 2002 and amended in 2004. Among other issues this amendment changed the name of the institution to Ombudsmen of RS-Human Rights Protector. It is an independent institution that protects legitimate rights and interests of natural and legal persons, in accordance with the Constitution of BIH, Constitution of the RS, and international agreements. It consists of three persons: Serb, Croat and Bosniak appointed by the RS National Assembly. This was changed in 2004 to establish an ombudsman and two deputy ombudsmen with the same ethnic distribution, with a 16-month rotation among them. Any non-ethnic individual is excluded from the possibility of becoming an ombudsman or deputy ombudsman.

The Ombudsmen act either upon a complaint filed by an interested party or *ex officio*. They are authorized to receive, follow up and investigate, *inter alia*, human rights violations committed by any state authority or official or other organizations, including private organizations that carry out activities falling under public affairs, as well as by the military authority or secret service. The Ombudsmen investigate cases involving deprivation of liberty, miscarriages of justice, but do not interfere with judicial functions in the RS. They can bring a case before the Constitutional Court of the RS. The Ombudsmen co-operate with and promote co-operation and co-ordination with the Ombudsmen in BIH.

It is the duty of governmental agencies and other public authorities and organizations in the RS, including private organizations that carry out activities falling under public affairs to assist the Ombudsmen in conducting investigations and inspections. The Ombudsmen have free access to any state body or service in order to check necessary information, conduct interviews and look into documents. The Ombudsmen issue recommendations to state bodies and may require that these bodies report in writing on actions taken to comply with recommendations in a timely manner. The Ombudsmen submit an annual report to the RS National Assembly. They issue a special report if required by the circumstances. These reports are made public.

Republic Administrative Inspection

The RS Republic Administrative Inspection is regulated by the above mentioned 2002 Law on Ministries. According to article 10 of this law, the Ministry of Administration and Local Self-government is responsible for the inspection of the public administration. The Law on the Civil Service in the RS Administration¹⁶ regulates administrative supervision. Its article 19 states that inspection supervision (*inspekcijski nadzor*) is performed by the ministries, through inspectors, while administrative inspectors perform the supervision of the work of the public administration organs (article 20). The distinction is quite confusing between the contents of the “administrative inspection of the public administration” and those of the “supervision of the work of public administration”.

The competencies of the administrative inspectors are supervision over enforcement of the laws, other regulations and general acts on the administration, administrative procedures, labour relations of civil servants, and office management (article 20). Administrative inspectors are civil servants of the competent ministry (article 21). To become an administrative inspector one must be a lawyer (*diplomirani pravnik*) who has passed the special exam (*stručni ispit*) and has at least five years of work experience in the administration at a level that is comparable with this education.

Administrative inspectors are empowered to: 1) order the undertaking of appropriate administrative actions; 2) stop the carrying out of certain administrative actions that administrative bodies are performing in breach of the law and regulations; 3) submit a request for initiating misdemeanor proceedings; 4) submit a motion for suspension of execution of the decisions found in breach of the law and regulations; 5) undertake other measures and actions as entitled by the law and other regulations (article 22).

Administrative inspectors have to record their findings (article 23). Administrative bodies are obliged (article 25) to facilitate the activities of the inspectors and to remove any obstacles that may hamper them, as well as

¹⁶ Official Gazette of the RS nos. 16/02, 62/02

to make available any required documents. The same article places an obligation upon the Republic administrative inspector to process the claims of the parties and to notify them about the results of the procedure.

Article 88 of the Law regulates the exercise and protection of rights and civil servants. Administrative inspectors perform the supervision over implementation of the regulations related to the rights and duties of the civil servants (Article 89). For this purpose, the administrative inspector is authorized to supervise the application of the general acts (*opšti akti*) that spell out rights and duties of civil servants (article 89-2). In performing that supervision, administrative inspectors are entitled to examine general and special (individual) acts of the administrative body and to obtain the necessary information in some other fashion (article 89-3).

A civil servant may address the administrative inspector in order to protect his rights (article 90-1). Should the administrative inspector find that the civil servant's rights have been violated, he shall duly inform the relevant body (Article 90-2). Should the administrative inspector find that a final decision constitutes an apparent violation of a civil servant's rights, and that the corresponding legal proceedings have been initiated in that regard, he shall, upon the civil servant's claim, suspend the execution of the final decision until an effective court judgment is rendered (Article 90-3). An appeal does not suspend the enforcement of the decision, mentioned in article 90-3 (Article 90-4). It is also interesting that the suspension referred to in article 90-3 cannot be challenged before the court (Article 90-5). The same solution is provided for in articles 38-39 of the *Law on Labor Relations in the State Organs*.¹⁷ Such a solution in fact limits the protection of civil servants' rights solely to internal administrative recourse and is not very favorable to civil servants. Judicial review of the final administrative decision should be ensured, thereby granting a higher level and quality of protection of civil servants' rights.

The administrative inspectorate under the Ministry of Administration and Local Self-government currently consists of seven inspectors and a chief inspector. To achieve better coverage and efficiency, seven inspectors are based in different areas of the RS, each of whom cover a specific geographical area, namely Doboje, Banja Luka, Bijeljina, Milici, Pale, Prijedor and Trebinje. There is no standard operating procedure applied within the RS Administrative Inspection.

Unlike inspectors in BIH Common Institutions, administrative inspectors in RS are not empowered to directly impose sanctions. Prior to imposing a sanction, administrative inspectors issue an order for correcting irregularities and for setting up the deadline for this correction (article 26 of the Law on Civil Service); if the responsible official fails to comply with that order, the inspectors may then put in motion the procedure to determine the responsibility of the official. Article 27 of the Law on Civil Service provides for an appeal to be filed against the decision of the administrative inspector within eight days of the date on which the decision was delivered. This appeal does not suspend execution of the decision.

This accountability system envisaged in the Law on Civil Service is clearly insufficient to control current shortcomings. As opposed to this system, the State level LAP provides for administrative supervision over application of the LAP (article 288-2 of the LAP of BiH) and sanctions (articles 289-292) that may be imposed upon both a state-level public administration institution and the responsible individual official. External control by Ombudsmen is in practice only symbolic.

Administrative Procedures

This section reviews the specific features concerning individual aspects of administrative decision-making in the RS institutions. The relevant law is the 2002 *Law on General Administrative Procedure*,¹⁸ which is similar to the administrative procedure laws already in force in the Federation of BiH (1998) and BiH (2002).

General and special procedure: The RS administrative decision-making system is based on the *Law on General Administrative Procedure (LAP)*. Apart from acting as a standard guideline for responsible officials, the LAP is also considered to be a major instrument for promoting legal certainty in the relations between the administration and the public. Although the subject-matter being dealt with may vary, the phases, deadlines and criteria involved can often be expected to conform to the provisions of this general law. There are exceptions, however. RS institutions apply the LAP (general procedural law) in all matters, unless the specific piece of legislation defining the issues to be decided (substantive law) provides for a certain

¹⁷ Official Gazette of the RS no. 11/94

¹⁸ Official Gazette of the RS no. 13/2002

departure from the general procedural rules. In such a case the latter is applied as *lex specialis*. A coherent approach to the management of the administration's competences suggests that the amount of speciality should be kept confined to what is strictly required by the subject, with the LAP continuing to apply by default for all other aspects.

The application of this key principle, however, presents some problems in the RS institutions, resulting from various factors. The large degree of external influence in the drafting of RS legislation, as well as State-level legislation (foreign organizations, consultants, etc.) has meant that sometimes those in charge of drafting substantive laws may have been familiar with the requirements under the LAP. This has raised doubts as to the lawfulness of the exceptions to the general law. There are a few cases in which elements of speciality have been introduced without any *lex specialis* having the same rank as the LAP, but rather through secondary legislation only.

Of course the impact of these inconsistencies may be limited, and the problem of normative hierarchy could be easily solved by amending the relevant substantive legislation in a manner that ensures the legality of the procedure. Nonetheless, the main point for the analysis is that the existence of such cases points to the weak compliance with the LAP at the time of drafting regulations in specific areas.

Interested parties: A party is defined as a person (natural or legal) following whose motion the procedure is initiated or as a person who has a right to participate in the procedure in order to protect his rights and legitimate interests. Also State bodies and other public organizations may be a party to a procedure if they are bearers of rights and obligations or interests that are being decided upon in the course of an administrative procedure. The party can also be a trade union, public prosecutor or other state organ entitled to act in order to protect the public interest (article 38-40 of the LAP). Parties can be active, passive or auxiliary. The active party is described as the one who submitted a request, the passive party is the one whose obligations (duties) are being determined in the course of an administrative procedure, while the auxiliary party is the one who, while neither active nor passive, may have a legitimate interest in the outcome of the procedure.

The majority of procedures start upon the request of an individual or organization (for example before the Republic Secretariat for Sport and Youth, or the Republic Prices Agency¹), while only some of them commence also *ex officio* (for instance, before the Ministry for Labour and Protection of Veterans and Disabled, Ministry for Education and Culture, Ministry of Internal Affairs, Ministry of Transport and Communications, Ministry of Defence). Some of them initiate the procedure solely by their own initiative, such as the Republic Foreign Currency Inspectorate. A few authorities institute proceedings upon a private initiative, *ex officio*, or also upon the initiative of a superior public authority or the suggestion of a prosecutor or other public body (for example, the Republic Administration for Geodesic and Property Affairs).

There is not a single case where the authority is required to seek consultations or the opinion of other institutions or experts in order to *initiate* the proceedings. This is, actually, a positive trend, taking into consideration that requiring one institution to ask the other institution for its opinion, consent or approval, may bring about undue delays (e.g. opinion, consent or approval is not delivered on time/at all), ultimately to the detriment of both parties.

The parties are notified by a written summons served personally to the party, his legal representative, neighbor, work place, etc. (article 75-82 of the LAP). A specific way of notification is notification by public announcement: if the case involves a number of persons whom the administrative authority does not know and it is not able to determine who they are, a notice is posted on the notice board of the administrative authority. Fifteen days after the announcement has been made public, it is assumed that the delivery has been made, unless the authority allows for a longer deadline. The public announcement can be also made through the media (article 82).

Hearing: Article 137 of the RS LAP provides for a hearing, which is conducted when more than two parties with conflicting interests are involved as well as when it is necessary to carry out an on-site inquiry or to hear a witness or expert witness. Likewise, article 130 of the LAP provides for a special examination procedure, which is conducted when it is necessary to establish facts of importance for the resolution of the matter or to grant an opportunity to the parties to exercise and protect their rights and legitimate interests. A special examination procedure is applied but not in all circumstances, as the law requires. In part, this can certainly be a consequence of the - apparent or actual - simplicity of the matter dealt with. Still, it is a fact that citizens' participation in an administrative procedure is not used regularly before the RS authorities; what is actually conducted in a considerable number of cases amounts to simple paperwork.

Article 130 of the RS LAP provides for a special examination procedure, to be conducted when necessary to establish facts of importance for the resolution of the matter or to grant an opportunity to the parties to

exercise and protect their rights and legitimate interests. It is a general rule that the deciding authority has to hear the parties (to conduct an oral hearing) in a case where two or more parties are involved, when an on-site inquiry has to take place, or when a witness or expert witness has to be heard (article 137 of the RS LAP). In practice, however, this procedural requirement may or may not be complied with, and much may be left to the evaluation of the official responsible for the procedure.

There is a specific case where some basic features of the criminal procedure have been taken over. Namely, *the Rulebook on Disciplinary and Material Responsibility of Civil Servants (Official Gazette of the RS no. 39/03)* includes provisions on the right to defence counsel, right to present evidence, oral hearing and other provisions that are typical of a criminal procedure. Besides, it has been noted that there are some procedures that are not typically administrative, although they result in administrative decisions. These include public procurement procedures, as well as the recruitment procedures for civil service personnel. Although decision-makers in those areas do apply the LAP as a law that governs individual aspects of the procedure *in concreto*, the entire set of provisions dealing with transparency are derogated, and the confidentiality of evidence is rather treated as a key principle until the determination of the final outcome.

The hearing can in general be excluded when the authority considers that it has sufficient information to take a lawful decision - mostly in the case of simple, "one-party" procedures - or when the party has submitted his position in writing. Article 129 of the RS LAP provides for a summary procedure (also known as "shortened" procedure), in the course of which the responsible official is not bound to hear the parties. The cases in which this is allowed are quite wide-ranging, being motivated *inter alia* by the sufficiency of the initial evidence (including when the facts are generally known or can be established on the grounds of official documents), by specific provisions allowing a decision on the grounds of mere probability, and obviously by the urgency of the decision.

Motivation of decisions: In principle, administrative decisions are in writing and are accompanied by a written statement of reasons. Oral decisions are rare and limited to cases of extreme urgency. The written form of the decision and its motivation are indeed what allows it to be challenged in the second instance and, if necessary, before the competent court. The motivation should contain all of the indications of the evidence considered by the responsible official, including any hearing of parties and other interested persons which may have taken place. Also, the court decision may point at common mistakes made in the course of both first and second instance procedures, as it may draw attention to jurisprudence pertaining to a particular administrative issue. In general terms, the quality of the motivation is therefore the best indicator of the quality of the decision-making process in general and may serve as a sort of instruction on the focus of attention to be paid while deciding an administrative matter. However, the quality of these motivations appears to be uneven: it is not rare for the reasoning to be essentially limited to little more than a reference to the material legislation in which the competence to decide is to be found. While this may be sufficient in the simplest cases, in others considerably more could be needed to provide a basis for second-instance decision-making and, ultimately, for possible court litigation.

Administrative appeals: The type and number of instances is one of the key indicators of the fairness of the procedure, which is a constitutional requirement in BiH due to the incorporation by the BiH Constitution (Annex II. 2) of Article 6 of the ECHR. In this respect, however, the relevant case law (not only from Strasbourg, but also from the Human Rights Chamber) is not widely known. Officials deciding on administrative matters do not consider this constitutional safeguard important, but mostly symbolic in value.

The overall structure of the procedure leading to a final administrative decision seems to be in general the one envisaged in the LAP, with few deviations. As to the authority responsible for making the decision, it may be said that in the RS the same institution conducts the procedure in both the first and second instances more often than is done in those institutions at the state level administration. For instance, this can be found regarding procedures in the Ministry of Labour and Protection of Veterans and Disabled Persons, Ministry of Agronomy, Forestry and Water Resources Management, Ministry of Science and Technology, Ministry of Internal Affairs, and Republic Foreign Currency Inspectorate.

There are few cases where administrative decisions are rendered in a single degree only, and are therefore immediately challengeable in front of the competent court – in this case, before the Supreme Court of the RS. The Rulebook on Military Service without Arms and as Civilian (Official Gazette of the RS no. 16/02) provides for a rather peculiar solution: namely, Article 5 of the Rulebook states that the appeal against the Decision of the Drafting Commission can be filed with the Minister of Defence, while decisions of the Minister of Defence cannot be either appealed or challenged before the competent court – no administrative dispute is allowed.

Normally, at that stage appeal would be limited to internal administrative recourse, while the court would act upon a lawsuit filed against a second-instance decision. In general terms, while direct judicial recourse may appear to offer a more expeditious remedy to the parties, correcting the decision within the responsible administration has advantages. It remains to be seen whether the rights and interests of parties are better protected if direct judicial recourse is put in place as a remedy against a first-instance administrative decision or if the internal second-instance recourse is provided within the administrative procedure.

Execution: Administrative decisions are enforced by administrative bodies. As far as “administrative execution” is concerned, it is the duty of the public authority to make sure that the rights of the party to which the enforcement pertains are protected in the course of the enforcement procedure - and that duty, prescribed by law, seems to be generally observed. The public authority, in particular, does so by choosing the manner of execution that is the most favorable for the person concerned.

Decision-makers’ accountability: The RS LAP does not prescribe who actually decides in administrative matters that fall within the administrative authority competence. In the RS administration, as in the FBiH and the BiH, administrative decision-making is characterized by a tendency to “verticality” - i.e. all decisions tend to be formally taken by the head of institution. He is expected to sign each decision issued, and delegation is not common (its use is mostly limited to replacing someone in the case of absence). The top official keeps hold of the ultimate responsibility towards the “outside world” for the entire decision-making process.

This means that although the LAP requires that in each institution an official is designated as responsible for conducting the procedure, the delegation is limited to carrying out all activities preparatory to the final decision itself. Officials responsible for the procedure do not sign the final decisions, although in some cases they may include their initials in the margin when preparing the text for the management. Their accountability remains therefore focused on internal answerability. In the case of wrong or inappropriate decisions, which may result in damage caused to the public or to the institution concerned, responsibility has to be claimed from the inside, through the hierarchical subordination link that makes the official accountable to the top manager in the institution.

Additionally, the instrument of disciplinary action can be used for demanding accountability within each institution. However, in spite of this being the only tool available until now, there are few disciplinary actions conducted against officials for misuse of his/her position, or for a serious mistake committed in the course of the procedure. The same applies for cases of material responsibility, through which a civil servant may be required to refund losses incurred by the administration as a result of the civil servant’s wrongful conduct.

Freedom of Access to Information

Another significant indicator of decision-making quality is the manner in which the procedure is “opened” towards scrutiny by those concerned - an aspect in which the central question concerns the right to access the files and/or documents pertaining both to the concrete administrative file and other documents and registries kept by the administration. The relevant practice, which is a main indicator of the transparency of administrative decision-making, appears to be subject to a double form of regulation in the RS administration, which results in confusion as to the applicable normative framework.

On the one hand, access to administrative documents is regulated in article 68 of the LAP. As in most systems with similar legislation, a party in the proceedings can request the responsible official to disclose the information in the file (i.e. pertaining to the procedure itself) at any stage of the procedure. Such a request, which can be made (and is usually made) verbally, results in the right of the party to access the file and to obtain, at his own cost, copies of the documents thereby collected - provided that their content is not officially classified as a secret protected by applicable laws (e.g. a state, military, or business secret, or personal data of other individuals). Apparently, this type of requests is, if not common, at least rather frequent, and the right to access the file is generally respected, with few exceptions in the case of personal, business, official or other type of secrets.

On the other hand, the National Assembly of the RS enacted in 2002 a separate *Law on Freedom to Access Information*¹⁹. The purpose of the law is wide, since any member of the public can, through a written request, obtain free copies of any information held by the administration within a deadline of 15 days - obviously apart from the usual exceptions. It is noticeable that the definitions of the entitled party and of the

¹⁹ Official Gazette of the RS no. 13/02

information accessible are so broad as to seriously put in question whether administrative procedure is really the point. The objective seems to be rather that of a general law on “transparent government”, addressing the needs of the general public and the press, quite apart from any concern for administrative decision-making in specific cases.

While this “freedom of information” act did establish a new procedure to access government-held information, it did not introduce new principles of administrative procedure in the general sense. Concerning access to the file within a procedure, the matter had already been regulated in the pre-war LAP, and it is not new in the 2002 Law enacted at the RS level. The modalities of access in that law, moreover, are clearly less burdensome for the parties - no need for the request to be written and no long deadlines for receipt of an answer.

Judicial Review of Administrative Acts

Administrative decisions by RS institutions are submitted for judicial review before the Supreme Court of the RS. Administrative disputes against lower-level decisions are decided by county courts, where the Supreme Court performs as an appellate court. Still, the fact that all of these instruments guaranteeing the protection of citizens’ rights are available does not necessarily mean that their application is faultless.

The procedure before the court follows the Law on Administrative Disputes (RS 2002); however, in reality there are very few special provisions for administrative cases, and consequently the Civil Procedures Law mainly applies. The district courts cover all kinds of administrative cases, including finance, war veterans, health care and property rights.

Judicial review, as a rule of the second instance decision before the Supreme Court of the Republic of Srpska, is used more frequently in comparison with its use at the State level.

Also, a direct judicial recourse against a first-instance decision is allowed in the case of decisions of the Concessions Commission (article 17 of the *Law on Concessions*, Official Gazette of the RS no. 25/02). The law provides for a direct judicial recourse by filing a lawsuit with the RS Supreme Court against decisions of the Commission within 30 days of the date on which the decision was delivered. This rather positive picture, however, rather depends on the matters dealt with and the nature of the parties involved.

Quality of Legislation

It has already been stated that the Parliamentary Assembly of Bosnia and Herzegovina recommended to other levels of government in BiH to pass the same set of rules. The Federation has passed rules with almost the same content. In the RS the situation is fairly similar to that of the State level and the FBiH.

The Republic Secretariat for Legislation was created in 2004 and now has 14 staff members (9 lawyers and 5 assistants). In addition to the Secretariat, now nearly every ministry has a unit for drafting legislation. In one year over 100 laws and 200 by-laws are adopted, with prior checking by the Secretariat. The Secretariat has to comment on all laws and regulations; for minor laws or amendments it has 7 days to produce its comments; for more important legislation it has 14 days.

The checking of the harmonisation of new legislation with the *acquis* is carried out by the Ministry of Economic Relations in cooperation with the Secretariat for Legislation. The ministry drafts an opinion on the degree of harmonisation and then sends the draft to the Secretariat, which checks legal consistency but also, once again, the harmonisation issue. In addition, now all ministries have formed internal harmonisation units. All staff have attended basic training on EU integration. Now that the SAA will be signed they will have to work on the transposition of about 15,000 EU regulations into national law. According to the Secretariat, these regulations have not yet been translated and they would need time and resources to do so²⁰.

The quality of legislation remains poor. In spite of all of the guidelines and regulations, working methods often prevent the situation from improving. An example can be seen with the drafting of a new Civil Service Law in RS. There is a working group, comprised of nine persons: a minister, an assistant minister, the secretary of the ministry, the head of the CS Agency, and the director of the Secretariat of Legislation. This shows that legislation continues to be written on too high a level and that delegation is not understood as a concept. This practice eliminates the possibility of internal checks and is a source of frustration for the more

²⁰ These regulations have already been translated into Serbian and Croatian languages, which are almost identical to that of the RS. It would be a good option for the RS to use the already translated materials.

junior staff. It shows at the same time that the job descriptions developed and the classification in place do not reflect real job content. The job descriptions state that advisors have independent tasks, give advice on complex issues, etc. and are accountable, which cannot be the case in view of the above practices.

Conclusions

1. Although difficult, on paper the system could guarantee the principle of legality, equality and the predictability of the administrative decision-making and actions countrywide. However, in practice the guarantees of citizens' rights are weak because of Bosnia and Herzegovina's peculiar internal constitutional and administrative set-up, which raises the issue of whether citizens have the same level of protection of their rights and interests no matter where they ask for protection. Equality before the law and before public authorities is not guaranteed and cannot be guaranteed under the current institutional set-up.
2. The organisation of the administration is not functional and the distribution of competences is unclear at most of the many existing government levels. It is necessary to clarify the distribution of competences among these levels, to reduce duplication and especially to eliminate legislative overlap. Overlapping legislative responsibilities should at least be reduced.
3. There should be a clearer hierarchy of laws, specifying the scope for local variation. The general administrative legislative framework should be set at a higher level, with a descending hierarchy of norms and a rationalization of administration. Indeed, it might be that public administration reform rather than constitutional reform plays the key role here.
4. The system inevitably results in a continuous – either apparent or concealed – struggle to enlarge competences, always at the expense of other governments, at all levels, horizontally and vertically, which in turn creates an intractable legal maze. The real problem rests with BIH's current politico-administrative structure, which hardly allows for arbitration among competing interests, given the practical absence of accepted arbitration mechanisms.
5. Complexity has been built into the system in order to secure safeguards for ethnic groups, but these measures have prevented progress towards a normally functioning democratic state, even if it is one that needs to be fragmented. Any attempt to create a centralized state based on citizenship is doomed to failure. Vested interests have coalesced around the current status quo in a way that may render any reform practically impossible.
6. Nevertheless, two major unified governance elements are needed: a general law on administrative procedures and a unified administrative justice system with a single law on administrative disputes.
7. General administrative procedures need to be unified for the whole country and local laws abolished. These procedures also need to be better aligned with democratic principles prevailing in most EU Member States. Current general laws on administrative procedures at the different levels are almost the same, but they are not exactly the same, which makes the situation for citizens and legal entities too diverse, to the point of hampering equality before the law. Special procedures should be reduced to a minimum at all government levels.
8. The current set-up for administrative justice is unfit to guarantee that the various existing administrations will abide by the rule of law. A countrywide unified law on administrative justice is needed, which endows administrative courts with full jurisdiction and creates better instruments to oblige administrative authorities to "refer the file" to the court and for more effective enforcement of administrative court rulings pronounced against public authorities.
9. No legal certainty can be guaranteed in a country where there is no supreme judicial instance empowered to unify legal doctrine and impose its legal interpretation on lower-ranking courts. The organisation of administrative justice needs to be done country-wide and needs to be established as a clearly designed hierarchy of courts.
10. The multiple Ombudsman institutions that now exist are rather ineffective. Their powers are limited, and their reports are not easily accessible to the public at large and are rather ignored by the respective parliaments.
11. Therefore, the general legal administrative framework is not sufficient to guide and control the performance of the civil service and public authorities. In addition, the civil service is disintegrated across four different systems. The ordinary citizen is the one who suffers the most from this situation.